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I. INTRODUCTION

Minnesota recognizes the necessity of balancing the duty of law enforcement officials to effectively protect the public and the peoples' constitutional right to be free from unlawful government intrusion.[1] For almost a century the courts have used the judicially imposed exclusionary rule to deter the police from violating an individual's Fourth Amendment guarantee against an illegal search and seizure by the police.[2] In *State v. Britton*,[3] the Minnesota Supreme Court had the opportunity to decide exactly how far the exclusionary rule should be extended, and in doing so, it overturned the trial court's decision to admit the evidence.[4]

Part II will begin by providing an analysis of *Britton*'s holding and then offer a critique of the Minnesota Supreme Court's decision by first discussing how it misstated what *Terry v. Ohio*[5] requires of law officers in the field, and then considering how the court ignored stare decisis by ruling in the way that it did. The author will conclude Part II by arguing that when *Terry* is considered from a historical context, it becomes apparent that its holding is not nearly as workable in today's society as it was when the United States Supreme Court handed down the decision over three decades ago.

Part III is dedicated to a discussion of the evolution of the suppression doctrine and the various tenets on which the United States Supreme Court relied to justify its exclusion of wholly reliable and trustworthy evidence gathered in violation of an individual's Fourth Amendment rights. Part IV will then consider how this wholesale suppression of probative evidence not only has failed in its purported purpose as a deterrent of constitutional violations

1. State v. Fish, 280 Minn. 163, 166-67, 159 N.W.2d 786, 789 (1968) (noting that although subject to certain enumerated exceptions, an arrest may not be made without a warrant, law enforcement officials, nevertheless, have a duty to protect the public safety by utilizing their faculties of observation and acting accordingly when they come upon suspicious individuals).

2. Weeks v. United States, 232 U.S. 383, 391-93 (1914) (holding that in a federal prosecution the Fourth Amendment bars the use of evidence obtained through an illegal search and seizure).

3. 604 N.W.2d 84 (Minn. 2000).

4. *Id.* at 89 (holding that the evidence obtained as a result of the stop was inadmissible because there was no evidence in the record to support the State's contention that the police stop was based on reasonable and articulable suspicion of ongoing criminal activity).

5. 392 U.S. 1 (1968).

by the police, but also has had a seriously detrimental effect on both the officers we entrust to protect us and society in general.

Britton was a product of a deeply divided Minnesota Supreme Court that was split 4–3. Close call cases like *Britton* exemplify the fact that a rule that commands the wholesale exclusion of trustworthy and reliable evidence is at worst a failure and at best a mistake. The *Britton* Court suppressed the evidence gathered by the arresting officers not because it in any way lacked veracity, but solely because of the exclusionary rule. Because the present remedy is unacceptable and clearly not a solution to the problem, there is simply no logical reason why the law-abiding members of society should be forced to endure it any longer. Other remedies exist that are far superior to allowing a guilty individual to escape justice. Part V will explore a completely alternative remedy that will guarantee our Fourth Amendment rights *and* protect society from those criminals who have committed wrongs against it. In other words, the alternative solution set forward in this article will serve all of the various needs that exist without forcing the courts to continue using a bright-line rule that clearly is ineffective in fulfilling its purported purpose.

II. *STATE V. BRITTON* AND THE *TERRY* DOCTRINE

A. *The Facts*

At approximately 11:00 p.m. on March 3, 1998, Launair Gerard Britton was driving a friend's automobile, which had a broken side window covered over with a plastic bag.[6] Suspecting that the vehicle may have been stolen, two Minneapolis police officers who were on routine patrol in North Minneapolis began to follow it.[7] While doing so, they learned through a computer check that the car was not listed as being stolen.[8] The officers continued to follow the defendant for approximately four blocks, and although they noticed no unusual or illegal driving conduct, they nevertheless believed the vehicle to be "suspicious" and stopped it.[9]

The officers approached the vehicle and noticed that, in addition to Britton, there were two passengers, one of them being a

6. State v. Britton, 604 N.W.2d 84, 86 (Minn. 2000).
7. *Id.*
8. *Id.*
9. *Id.*

twelve-year-old child.[10] While questioning the driver, the officers observed signs of intoxication and arrested him.[11] A blood alcohol test was duly administered ultimately confirming the officers' suspicions that the suspect had a blood alcohol content that exceeded the legal limit.[12]

Two days later, Britton was charged in Hennepin County District Court with various driving offenses, including an aggravated driving violation and driving with an alcohol concentration over .20, which is child endangerment.[13] The defendant filed a motion to suppress any evidence obtained from the traffic stop, claiming the stop violated both the Fourth Amendment of the United States Constitution and Article I, Section 10 of the Minnesota Constitution.[14]

One of the officers testified that, in his experience, the broken side window was an indication that the vehicle may have been stolen because breaking windows is "a common practice for stealing vehicles."[15] The officer further testified that he had been involved in the investigation and recovery of ten to twenty stolen automobiles with broken windows.[16] He noted that the negative computer check in no way dispelled either his or his partner's suspicion that the vehicle was in fact not stolen.[17] The officer explained to the court that such checks are not always determinative because vehi-

10. *Id.*

11. *Id.*

12. *Id.* It is unlawful for a person to drive, operate, or be in physical control of a motor vehicle when his blood alcohol concentration meets or exceeds .10. MINN. STAT. § 169.121, subd. 1(d) (1996).

13. *Britton*, 604 N.W.2d at 86. A person determined to be driving under the influence of alcohol under section 169.121, subd. 1, or who refuses to submit to testing as per subd. 1(a), and who has a child in the vehicle who is less than sixteen years of age is guilty of a gross misdemeanor if that child is more than thirty-six months younger than the violator. MINN. STAT. § 169.121, subd. 3(c)(4) (1996).

14. *Britton*, 604 N.W.2d at 86. The Minnesota Constitution provides that:

> [t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

MINN. CONST. art. I, § 10. The Minnesota Constitution is identical to the United States Constitution's Fourth Amendment search and seizure provision. U.S. CONST. amend. IV.

15. *Britton*, 604 N.W.2d at 86.

16. *Id.*

17. *Id.*

cles are often stolen in the nighttime hours leading to delays in discovery and ultimate reporting of the thefts.[18]

Based on this testimony, the district court upheld the stop, finding that it was based on something "more than whim or caprice," and therefore proper under the United States and Minnesota Constitutions.[19] As a result, the district court ruled that the evidence obtained during the stop was admissible.[20] Britton waived his right to a jury trial and, based on the stipulated facts, the court found Britton guilty of driving with an alcohol concentration of more than .20—child endangerment, an enhanced gross misdemeanor.[21]

Britton appealed the trial court's decision to the Minnesota Court of Appeals.[22] In an unpublished decision, the appellate court affirmed the lower court's holding.[23] Writing for a split court, Judge Toussaint noted that "the MDT [Minnesota Department of Transportation] check did not conclusively dispel Officer Taylor's suspicion that the car was 'recently stolen' and had not yet been reported. Furthermore, Taylor's training and experience provided a reasonable basis for his suspicion. Therefore, Britton's Fourth Amendment rights were not violated."[24] Britton appealed the circuit court's decision to the Minnesota Supreme Court, which granted certiorari to review the question of reasonable suspicion de novo.[25]

B. The Minnesota Supreme Court's Analysis

The Minnesota Supreme Court, citing *Terry*, *United States v. Sokolow*, and *State v. George*, concluded that the trial court erred in admitting the evidence and reversed, finding no evidence in the record sufficient to conclude that the investigative stop was based on a reasonable and articulable suspicion of ongoing criminal activity.[26] The court defined the limited investigatory stop made by Of-

18. *Id.*
19. *Id.* at 87.
20. *Id.*
21. *Id.*
22. *Id.*
23. State v. Britton, No. C9-98-968, 1999 WL 43322, at *2 (Minn. Ct. App. Feb. 2, 1999).
24. *Id.*
25. *Britton*, 604 N.W.2d at 86.
26. *Id.* at 87-89 (citing Terry v. Ohio, 392 U.S. 1, 21 (1968), United States v. Sokolow, 490 U.S. 1, 7 (1989), and State v. George, 557 N.W.2d 575, 578 (Minn.

ficer Taylor and his partner as a *Terry* stop[27] and reasoned that, since the state "did not show an objectively reasonable articulable suspicion on the part of the officer before the computer check," the evidence gathered from the stop should never have been admitted.[28] The supreme court relied on *Terry* when it said that there was no objective evidence in the record to justify the stop, and the subjective good faith of law enforcement officials, without more, is not sufficient to justify a search and seizure.[29]

C. *The Minnesota Supreme Court Misstates* Terry's *Requirements*

The Minnesota Supreme Court erred in reversing the decisions of the trial and appellate courts. Less than three years prior to *Britton*, the Minnesota Supreme Court stated in dicta that the burden law enforcement officers must overcome to justify a traffic stop is not a heavy one.[30] The court has also instructed that the police must be afforded the opportunity to inquire in order to safeguard the community.[31] As long as the stop is not based on mere whim, caprice, or idle curiosity, but is instead based on reasonable inferences drawn by an experienced police officer, it will be

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1997) as the basis for the conclusion that investigative stops by law enforcement officers must be based on articulable facts which give rise to an objective manifestation that the individual stopped is, or is about to be, engaged in criminal activity).

27. *See generally* Terry v. Ohio, 392 U.S. 1 (1968). In *Terry*, Officer McFadden observed Terry and his cohorts, repeatedly and for an extended amount of time, performing reconnaissance on a store by means of casually gazing through its window. *Id.* at 6. Suspecting that the three men were carrying guns and planning to burglarize the establishment, McFadden felt it would be appropriate to take direct action against them. *Id.* He approached them, identified himself as a police officer, and asked for their names. *Id.* at 6-7. He then grabbed Terry, patted him down from outside his clothing and felt a pistol. *Id.* at 7. Only after he felt the gun did Officer McFadden remove Terry's overcoat, pulling from one of the pockets a .38 caliber revolver. *Id.* After balancing society's interest in having effective law enforcement with an individual's constitutional right to be free from illegal searches and seizures by the government, the Court held that the police may conduct limited stops to investigate suspected criminal activity when the police can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 20-21.

28. *Britton*, 604 N.W.2d at 88.

29. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968), which in turn quotes Beck v. Ohio, 379 U.S. 89, 97 (1964)).

30. State v. George, 557 N.W.2d 575, 578 (Minn. 1997). In most circumstances, "if an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle." *Id.*

31. State v. Dezso, 512 N.W.2d 877, 880 (Minn. 1994) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 224-25 (1973)).

deemed constitutional.[32]

Britton is not a case of idle curiosity by an inexperienced law enforcement official,[33] and the court was incorrect when it concluded that the officers, when considering the broken window, failed to make an assessment based on training and experience.[34] Officer Taylor testified to his training and experience when he stated that he had been involved in the recovery of ten to twenty stolen cars with broken windows.[35] All that was initially required was that the officers have sufficient reason to stop Britton, not probable cause for arrest.[36] The police were well within their rights and, in fact, had a duty to stop the vehicle and inquire as to the driver's identity and actions.[37] In *United States v. Cortez*,[38] Chief Justice Burger emphasized that in determining whether there was a particularized and objective basis for suspecting the defendant, "a trained officer [may] draw[] inferences and make[] deductions . . . that may well elude an untrained person."[39] Officer Taylor and his partner stopped Britton based on their knowledge and experience that such vehicles are quite often stolen.[40] Although the majority in *Britton* claimed to be "deferential to police training and experience and recognize that a trained officer can properly act on suspicion that would elude an untrained eye,"[41] this was apparently little more than lip service paid by the court.[42]

The court held that since the stop lacked any objective manifestation that Britton was engaged in criminal activity, the stop was illegal according to *State v. George*.[43] However, the court was incor-

32. State v. Barber, 308 Minn. 204, 206, 241 N.W.2d 476, 477 (1976) (quoting Terry v. Ohio, 392 U.S. 1, 21(1968)).

33. *Britton*, 604 N.W.2d at 86-87.

34. *Id.* at 88.

35. *Id.* at 86.

36. State v. Johnson, 257 N.W.2d 308, 309 (Yetka, J., dissenting).

37. *Id.* at 310.

38. 449 U.S. 411 (1981).

39. *Id.* at 418. Chief Justice Burger concluded that "the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Id.*

40. *Britton*, 604 N.W.2d at 86.

41. *Id.* at 88-89.

42. *Id.* at 90 (Gilbert, J., dissenting) (citing State by Beaulieu v. City of Mounds View, 518 N.W.2d 567, 569-70 (Minn. 1994), which recognized the court's deference to police officer experience and the officer's discretion to act on that experience).

43. *Id.* at 87-88.

rect in applying this standard. In *State v. Mason*,[44] the Minnesota Supreme Court concluded that "if a valid basis for the police intrusion existed, a basis which the district court and this court can assess, it does not matter if the officer could not articulate a specific criminal activity."[45] Suspicion is all that is required as long as the officer can sufficiently articulate the factual basis for that suspicion.[46] Therefore, "[t]he ultimate determinative issue ... is not whether the officer saw the violation but whether his 'belief' (or 'suspicion' or 'assumption') that the violation occurred was reasonably inferable from what he did see."[47] Officer Taylor stated that the basis for the stop was his *belief* that the broken window was an indication that the vehicle was stolen.[48] Thus, the stop was based on more than a mere "unarticulated hunch" as is required by *United States v. Sokolow* and its progeny.[49] Police officers are professionals trained in the field of law enforcement, and like other professionals, they have a keen sense of knowing when something is wrong.[50] Because these professionals rely on their expertise, they are not always able to easily articulate into words what exactly is wrong.[51] However, simply because a police officer may lack the training or ability to clearly articulate the basis for his suspicion or belief, this does not mean that the criteria he used lacked the objectivity commanded by *George* and *Cortez*.[52]

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44. No. C4-93-339, 1993 WL 430388 (Minn. Ct. App. Oct. 26, 1993).

45. *Id.* at *2.

46. Berge v. Comm'r of Pub. Safety, 374 N.W.2d 730, 732 (Minn. 1985).

47. *Id.* at 733.

48. *Britton*, 604 N.W.2d at 86.

49. United States v. Sokolow, 490 U.S. 1, 7 (1989); *accord* State v. Johnson, 257 N.W.2d 308, 309 (Minn. 1977).

50. Daniel Richman, *The Process of Terry-Lawmaking*, 72 ST. JOHN'S L. REV. 1043, 1050 (1998).

51. *Id.* Richman argues:

> Moreover, having been selected according to a list of criteria on which the ability to offer legal justifications may not rank very high, and lacking access to the kind of comprehensive data bases [sic] that other professionals draw upon to educate and justify their intuitions, our police officer will often be particularly ill-equipped to articulate the factors informing his hunches.

Id.

52. State v. George, 557 N.W.2d 575, 578 (Minn. 1997) (citing United States v. Cortez, 449 U.S. 411, 417 (1981)). In *Cortez*, the Border Patrol used their knowledge and expertise concerning the smuggling of illegal aliens. They acted on such evidence as human footprints and vehicle types. Similarly, the officer in *Britton* used his extensive knowledge and experience as a police officer versed in the investigation of stolen vehicles. This can be evidenced in his testimony that the majority of stolen vehicles that the police recover have broken side or wing

In dismissing Britton's second argument that even if the police had reasonable suspicion to stop the car it was conclusively dispelled once the computer check revealed that it was not listed as stolen,[53] the court accepted Officer Taylor's explanation of why the check did not dispel his suspicion.[54] In other words, the court accepted as true his testimony concerning the delays inherent in the discovery and reporting of vehicles stolen in the evening hours.[55] The supreme court's willingness to accept this testimony, yet reject the officer's testimony concerning the reasonable suspicion created by the broken window, is both curious and wholly inconsistent.[56] At no point did the court offer an explanation for the distinction.[57]

In addition, as Justice Gilbert expounded in his dissenting opinion, "the majority simply overstates what reasonable, articulable suspicion requires."[58] In its decision, the court offered numerous legitimate explanations that the officers could have considered before stopping Britton.[59] However, *Terry* neither requires a police officer to discount the gamut of possible lawful explanations for the facts which create reasonable suspicions in his mind, nor does it contemplate courts to make forays into the world of supposition and conjecture.[60] What *Terry* does command is that "the police officer ... be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[61] Officer Taylor did just that when he testified to his concern over the broken window.[62] In or-

windows. Therefore, his decision to investigate was based not on whim, caprice, idle curiosity, or an unarticulated hunch. Instead, it was the result of significant experience in the recovery of stolen vehicles based on an objectively reasonable belief that Britton was driving such a vehicle. Furthermore, unlike the officer in *George* whose observation of the defendant's vehicle's headlight configuration was patently spurious, officer Taylor's belief was not incorrect. He clearly and correctly observed that the window was broken and covered over with plastic.

53. *Britton*, 604 N.W.2d at 87.

54. *Id.* at 88.

55. *Id.*

56. *Id.* at 90 (Gilbert, J., dissenting).

57. *Id.* at 89.

58. *Id.* at 90.

59. *Id.* at 88. The court offered the following: 1) the contents of the vehicle could have been stolen rather than the vehicle itself; 2) even if the vehicle had been stolen, the victim rather than the perpetrator may have been driving it; and 3) the window could have been broken, not due to a crime, but because of an accident or, as the court supposed, an owner who locked his keys in the car. *Id.*

60. *Id.* at 90 (Gilbert, J., dissenting).

61. Terry v. Ohio, 392 U.S. 1, 21 (1968).

62. *Britton*, 604 N.W.2d at 86.

der for the stop to be legal, it was not necessary for him to be "absolutely certain" that a crime had been committed, but only that it was reasonable for him to conclude, in light of his experience, that "criminal activity may be afoot."[63] The court's misstatement of what exactly *Terry* requires of police officers, combined with the fact that it improperly discredited Officer Taylor's testimony, serves to create confusion in the minds of law enforcement officials.[64] Adding to this consternation is the court's refusal to recognize Officer Taylor's reliance on the broken window as an objective basis for reasonable suspicion when in *State v. Smith*[65] the Minnesota Court of Appeals held that a broken side window *is* probable cause to search a vehicle.[66]

D. The Minnesota Supreme Court Ignores Stare Decisis

Unfortunately, the Minnesota Supreme Court's failure to respect its holding in *State v. Barber*[67] only increases the uncertainty among the police.[68] In *Barber*, Officer William Henry of the Minnesota Highway Patrol observed Barber and his companion traveling in a vehicle with license plates attached by bailing wire instead of the bolts typically used on vehicles.[69] With his suspicions aroused, Officer Henry stopped the vehicle to investigate whether the plates might have been unlawfully taken from another vehicle.[70] When asked for his driver's license, the defendant produced a notice of license revocation that had been issued by the state.[71] After verifying the revocation over his radio, Officer Henry arrested Barber.[72] At the Rasmussen hearing, Officer Henry testified that he had no other reason for stopping the defendant.[73] Therefore, the issue became whether the officer was justified in stopping the defendant based merely on his suspicions concerning the use of bailing wire

63. *Terry*, 392 U.S. at 27, 30.
64. *Britton*, 604 N.W.2d at 89 (Gilbert, J., dissenting).
65. No. C6-92-915, 1992 WL 383456 (Minn. Ct. App. Dec. 29, 1992).
66. *Id.* at *1 (noting that a broken side window is a "common indicator that a vehicle has been stolen").
67. 308 Minn. 204, 241 N.W.2d 476 (1976).
68. *Britton*, 604 N.W.2d at 89 (Gilbert, J., dissenting).
69. *Barber*, 308 Minn. at 204-05, 241 N.W.2d at 476.
70. *Id.* at 205, 241 N.W.2d at 476.
71. *Id.*
72. *Id.*
73. *Id.*

instead of bolts to affix the license plates.[74]

In affirming the conviction and upholding the trial court's ruling that the stop was legal, the court distinguished *State v. McKinley*,[75] which had been decided almost one year earlier. In *McKinley*, the court held that single, nonsystematic stops for routine driver's license checks required as justification *some* reasonable suspicion by police of a violation.[76] However, in arriving at this decision, the *McKinley* majority approvingly quoted the New York Court of Appeals, which noted in *People v. Ingle*[77] that "the factual basis required to support a stop for a 'routine traffic check' is minimal. An actual violation of the Vehicle and Traffic Law need not be detectable. For example, an automobile in a general state of dilapidation might properly arouse suspicion of equipment violations."[78]

The *Barber* majority concluded that, irrespective of the fact the plates were attached in an apparently legal way, since Officer Henry relied upon his experience as a police officer knowledgeable in the methods of motor vehicle thievery,[79] his decision to stop the defendant's vehicle was based on more than "mere whim, caprice, or idle curiosity."[80] In explaining its decision in *Britton*, the court stated that "[e]vidence of tampering or unauthorized replacement of license plates ... can be suggestive of ongoing criminal activity in a way that a broken window is not."[81] However, it is clear that the court simply embarked on an attempt to create a distinction without a difference, and *Terry* simply does not support such a reading.[82]

The fact of the matter is that *Barber*'s facts relating to "objective indicia and reasonable inferences" are not logically distinguishable from those of *Britton*.[83] When Officer Taylor used his experience to

74. *Id.* at 205, 241 N.W.2d at 476-77.
75. 305 Minn. 297, 232 N.W.2d 906 (1975).
76. *Id.* at 303-04, 232 N.W.2d at 911.
77. 330 N.E.2d 39 (N.Y. 1975).
78. *Id.* at 44.
79. For example, the court explained, clean plates on a dirty car often suggests that the plates do not belong to the vehicle. When motor vehicles are used to perpetrate a crime, the wrongdoer will often use plates stolen off of other cars to escape apprehension even if the plates are observed. By using wire rather than bolts to secure the plates to the car, that criminal may be able to remove them more quickly than he otherwise could have. *Barber*, 308 Minn. at 207, 241 N.W.2d at 477.
80. *Id.*
81. State v. Britton, 604 N.W.2d 84, 89 (Minn. 2000).
82. *Id.* at 90 (Gilbert, J., dissenting).
83. *Id.* at 91.

make the decision to stop a "suspicious vehicle" being driven during the late-night hours with a broken window, his actions were precisely the same as those of Officer Henry when he pulled Barber over for driving a vehicle with license plates held on by bailing wire.[84]

The Minnesota Supreme Court minimized the importance of police training and experience when it made the determination of whether or not Officer Taylor had a "reasonable" basis for stopping Britton.[85] In addition, by failing to take into consideration Officer Taylor's heightened suspicion over thefts taking place during his "dog-watch" (8:00 p.m. to 4:00 a.m.), the court effectively ignored its earlier ruling in *State v. Lee*[86] where it held as relevant to its probable cause analysis the fact that the police knew that "tires are more commonly taken from automobiles at night than during the day."[87] Not only does the court turn stare decisis on its head by effectively overruling *Barber* without explicitly stating so,[88] it also ignores what the United States Supreme Court, circuit courts, and other state courts have long stated regarding the importance of taking officer knowledge, training, and experience into account when considering reasonableness and probable cause.[89] In addition, when *Terry*'s

84. *Id.*

85. *Id.* at 90.

86. 302 Minn. 382, 225 N.W.2d 14 (1975). In *Lee*, Officer Joseph Guy stopped defendant, Vernon Lee, and through the rear window observed two mounted tires that were not the correct size for the defendant's vehicle. Although Officer Guy questioned Lee at the scene, he did not arrest him. However, he did seize the tires and rims which were later identified by the owner as the wheels that had been stolen from his car earlier that night. Based on the owner's statement, the defendant was arrested for felonious theft. The district court dismissed the prosecution reasoning that the arrest was based on an illegal seizure by the police. In reversing and upholding the seizure, the Minnesota Supreme Court noted as relevant to Officer Guy's probable cause assessment the fact that he stopped Lee and made his observations at 4:15 a.m., a time at which tires are more commonly stolen from vehicles than during the day. *Id.* at 382-87, 225 N.W.2d at 15-17.

87. *Id.* at 385, 225 N.W.2d at 16. *See also* State v. Compton, 293 N.W.2d 372, 375 (Minn. 1980) (acknowledging that the officer was justified in concluding that the items were stolen because "[s]tore burglaries usually occur at night"); Commonwealth v. Ellis, 335 A.2d 512, 515 (Pa. Super. Ct. 1975) (recognizing that although "the Fourth Amendment [does not] lie[] dormant during the night hours, ... some activities that are commonplace during daytime ... hours give rise to suspicion during other times of the day").

88. *Britton*, 604 N.W.2d at 90 (Gilbert, J., dissenting).

89. United States v. Brignoni–Ponce, 422 U.S. 873, 885 (1975) (noting that "[i]n all situations the officer is entitled to assess the facts in light of his experience ...."); United States v. Ortiz, 422 U.S. 891, 897 (1975) (explaining that the police are entitled to draw reasonable inferences from the facts in light of their

holding is examined more closely, it becomes apparent that the Court was quite deferential to the street officer's experience and

knowledge and prior experience); United States v. McCoy, 200 F.3d 582, 584 (8th Cir. 2000) (recognizing law enforcement experience in holding that the "plain smell" rule gave the officer probable cause to search the defendant's vehicle when he noticed the odor of burnt marijuana); United States v. Bartelho, 71 F.3d 436, 441 (1st Cir. 1995) (finding that the police were not required to take the defendant's girlfriend's statement at face value, "especially given their domestic-abuse training"); United States v. Janus Indus., 48 F.3d 1548, 1553 (10th Cir. 1995) (noting that the United States Customs agent's four years of experience and specific expertise with drug paraphernalia may be considered in the judge's calculus); United States v. Mueller, 902 F.2d 336, 342 (5th Cir. 1990) (holding that the officer's ten years of training and knowledge of those chemicals commonly used in the manufacture of methamphetamine provided a sufficient basis for the magistrate to conclude that the officer could reasonably smell and recognize the presence of this illegal substance); United States v. Hoyos, 892 F.2d 1387, 1392 (9th Cir. 1989) (explaining that "[t]he experience and expertise of the officers involved in the investigation and arrest may be considered in determining probable cause"); United States v. McClard, 333 F. Supp. 158, 164 (E.D. Ark. 1971) (pointing out that a magistrate has a right to give weight to a law enforcement officer's presumed expertise); State v. Ceron, 573 N.W.2d 587, 593 (Iowa 1997) (holding that the officer had probable cause to make a warrantless arrest for drug possession based partly on the fact that he had fifteen years of experience, six of which took place in a drug investigation unit); Gonzales v. State, 648 S.W.2d 684, 687 (Tex. Crim. App. 1983) (expounding that "[a] police officer is authorized to rely on his training and knowledge whether or not he gains it from personal experience in the field, formal training or on-the-job training via other, more experienced officers"); State v. Dorsey, 731 P.2d 1085, 1088 (Utah 1986) (explaining that recognition should be given to a police officer's experience and training "where there are objective facts to justify the ultimate conclusion"); State v. Graham, 927 P.2d 227, 234 (Wash. 1996) (taking into account the fact that the two arresting officers had been involved in excess of 2,200 narcotics arrests between them); State v. Secrist, 589 N.W.2d 387, 395 (Wis. 1999) (considering in its probable cause determination the fact that the arresting officer was a trained veteran with twenty-three years of experience). *See also* Florida v. Royer, 460 U.S. 491, 525 (1983) (Rehnquist, J., dissenting) (noting that "a law enforcement officer can rely on his own experience in detection and prevention of crime"); United States v. Mendenhall, 446 U.S. 544, 565-66 (1980) (Powell, J., concurring) (instructing that "[i]n applying a test of 'reasonableness,' courts need not ignore the considerable expertise that law enforcement officials have gained from their special training and experience"). *Accord* AM. LAW INST. MODEL CODE OF PRE-ARRAIGNMENT PROC. § 120.1 cmt. 6 (1975).

> [T]he decision to arrest may be based on all facts which to an experienced and careful officer bear on the likelihood of guilt, and ... this decision may be made in the light also of any expert knowledge which the officer possesses .... [A] good patrol officer considers it his business to develop so complete a familiarity with his "beat" that he is alerted by anything suspicious or unusual. To the extent that the officer can articulate the factors supporting his suspicions, he should be allowed to use them in justifying an arrest.

Id.

judgment.[90] For example, Chief Justice Warren did not apparently attach any importance to what kind of store Terry and his accomplices were casing.[91] In fact, the Court made no mention whatsoever as to what kind of store it was.[92] Therefore, it could rightfully be concluded that the Court clearly appreciated that a police officer could draw upon his experience and training to know that an armed robbery could occur in any store with cash or valuables no matter what type of business in which it may have been engaged.[93] What is even more interesting is the majority's failure to address the fact that the defendants had already walked away from the store when Officer McFadden approached and started questioning them.[94] The Court's refusal to concern itself with this issue further demonstrated its deference to the knowledge and experience that law enforcement officials possess.[95]

The Minnesota Supreme Court's misstatement of what articulable, reasonable suspicion requires, combined with its refusal to respect stare decisis, will have the undesired effect of making it more difficult for law enforcement in the state to do its job. The court's ruling will result in more challenges to the officers' heat-of-the-moment decisions and an increased use of the exclusionary rule. This, in turn, will force judicial officers, who are not experts in matters of law enforcement, into the position of having to make determinations of reasonableness with less than a full understanding of the facts.[96] Judges and magistrates should not disregard the testimony of police officers whose experience and training make them experts in matters of law enforcement.[97] To the contrary, the courts must accept the benefit of law enforcement's knowledge and expertise, while giving due regard for the fact that police officers are simply not afforded the same luxury for relaxed reflection as judges and magistrates enjoy in their judicial chambers far removed from the perils of the street.[98]

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90. Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, 926-27 (1998).

91. *Id.* at 926.

92. *Id.*

93. *Id.*

94. *Id.* at 926-27.

95. *Id.* at 927.

96. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.2(c) (3d. ed. 1996).

97. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1(c) (3d. ed. 1996).

98. David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court*

E. Terry's Historical Backdrop And The Need To Look Forward

Britton exemplifies how a court can effectively misinterpret the holdings of *Terry* and its progeny and substitute its own ideas about what is "reasonable" for that of a trained expert in the field, while at the same time offering little in the way of direction or consistency to those law enforcement officers entrusted to keep our communities safe.[99] Is a strict adherence to an outdated doctrine really in the best interest of present day society? When one considers *Terry*'s historical backdrop, one cannot help but question whether there still exists a need to adhere to a rule that was developed by the Court over thirty years ago when both the political and social climates of the United States were vastly different from how they appear today.

The nineteen sixties was a tumultuous era in American history.[100] President John F. Kennedy was assassinated in 1963 and only four and one-half years later both the great Dr. Martin Luther King, Jr. and presidential candidate, Robert F. Kennedy, met the same unfortunate fate.[101] Students protested the military conflict in Indochina commonly referred to as the "Viet Nam War."[102] Perhaps most significantly, racial friction could be witnessed throughout the country due in part to law enforcement's use of abusive stop and frisk procedures against African Americans.[103] This misuse of field interrogations resulted in the upheaval and destruction of inner city neighborhoods that were so serious as to prompt President Lyndon B. Johnson to order an investigation by the President's Commission on Law Enforcement and the Administration of Justice.[104] On the other side, Richard M. Nixon attempted to bolster his candidacy in the presidential campaign of 1968 by exploiting the widespread fears of a breakdown of public order.[105] Referring largely to the United States Supreme Court's landmark

Rhetoric Versus Lower Court Reality Under Terry v. Ohio, 72 ST. JOHN'S L. REV. 975, 999 (1998).

99. *See generally* State v. Britton, 604 N.W.2d 84, 89 (Gilbert, J., dissenting) (expressing that the majority's holding creates "confusion" rather than giving "clear direction" as to what standard governs police behavior in Terry-stops).

100. Harris, *supra* note 98, at 980.

101. *Id.* at 979-80.

102. *Id.* at 979.

103. *Id.* at 980-81.

104. *Id.* at 981.

105. Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. F. 518, 539 (1975).

decisions of *Escobedo v. Illinois*[106] and *Miranda v. Arizona*,[107] the Republican candidate for president accused the Supreme Court of giving the "green light" to the nation's "criminal elements."[108] In a 6,000-word document entitled "Toward Freedom from Fear," Nixon's New York Office decried that it was the candidate's belief that some of the "courts had gone too far in weakening the peace forces as against the criminal forces."[109] It was Nixon's belief that the cumulative impact of *Escobedo* and *Miranda* was to "very nearly rule out the confession as an effective and major tool in prosecution and law enforcement."[110]

The legislative branch also reacted strongly to the Warren Court's recent decisions by passing the Omnibus Crime Control and Safe Streets Act of 1968 only ten days prior to the *Terry* decision.[111] It was Congress' conclusion that due to the "high incidence of crime in the United States," in order for society to be adequately protected, "law enforcement efforts must be better coordinated, intensified, and made more effective at all levels of government."[112] Some of the Act's provisions were obviously retaliatory measures waged by Congress against the Court.[113]

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106. 378 U.S. 478 (1964). The *Escobedo* court held that:

> where ... the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "The Assistance of Counsel" in violation of the Sixth Amendment ... and any evidence thereby obtained will be deemed inadmissible.

Id. at 490-91.

107. 384 U.S. 436, 478-79 (1966) (holding that once the police give the suspect his *Miranda* warnings prior to interrogation, if that individual indicates that he wishes to exercise his Fifth Amendment right against self-incrimination, interrogation must immediately cease and any statements subsequently taken will not be admissible).

108. *Nixon Links Court to Rise in Crime*, N.Y. TIMES, May 31, 1968, at 18.

109. Robert B. Semple, Jr., *Nixon Decries 'Lawless Society' and Urges Limited Wiretapping*, N.Y. TIMES, May 9, 1968, at 1.

110. *Id.*

111. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. (1968). The purpose of this act was "[t]o assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes." *Id.*

112. *Id.*

113. Allen, *supra* note 105, at 539.

These events combined to create an atmosphere that compelled the Court to balance the interests of the police and society in law enforcement and crime prevention with the interests of the people to be free from unwarranted government intrusion.[114] It is clear that when the Chief Justice wrote the opinion of the Court in 1968, he and the other justices were concerned about controlling abusive police practices on the street.[115]

The *Terry* holding was based during a time of significant turmoil, social unrest, and change in American history, and the current situation in the twenty-first century no longer resembles that of the late nineteen sixties. As a result, the facts on which *Terry* was premised have so dramatically changed over the past thirty-three years as to render its holding far less workable in today's society. The ever-increasing level of crime and violence prevalent in modern-day America continues to take an adverse toll on our personal security. At the same time, although it is certainly true that constitutional violations by law enforcement continue to occur, this cannot be compared to the abusive atmosphere of some three decades ago. Furthermore, because a removal of the *Terry* doctrine would not lead to an instability in American society, it is not necessary that the courts continue to adhere to it. There are viable alternatives that can deter Fourth Amendment violations by the police without setting criminals free by excluding reliable and trustworthy evidence.[116] As with any doctrine that has outlasted its purpose and no longer properly serves the legal and societal functions it was intended to, we must look beyond *Terry* and the continued use of the troubled exclusionary rule.

III. THE EMBARRASSED EVOLUTION OF THE EXCLUSIONARY RULE

A. *The Supreme Court's Early Use Of The Fifth Amendment To Exclude Evidence*

Since the late nineteenth century, the United States Supreme Court has created a variety of rationales for the judicially imposed exclusion of otherwise admissible evidence. The Court began the

114. Harris, *supra* note 98, at 981. *See also* Terry v. Ohio, 392 U.S. 1, 26 (1968) (stating that a police officer's search for weapons is an "intrusion" that must be limited to only what is necessary).

115. John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 839 (1998).

116. *Infra* Part V.

evolution of the suppression doctrine by linking the Fourth and Fifth Amendments. Approximately twenty-eight years later, the Court started using the Fourth Amendment as a sole basis for the suppression of reliable evidence. Finally, through time, the Court has developed additional justifications for the exclusionary rule.

The exclusionary rule can correctly be characterized as a distorted and awkward attempt by the Court to provide a remedy for misconduct by law enforcement.[117] The practice of excluding wholly reliable evidence[118] obtained in such a way that offends at least five justices of the Supreme Court finds its roots two centuries past in the landmark case of *Boyd v. United States*.[119] The *Boyd* court ruled that "the fourth and fifth amendments run almost into each other" and are intimately related.[120] The Court reasoned that law enforcement employed unreasonable searches and seizures in an effort to compel criminal suspects to offer incriminating evidence against themselves. Therefore, since the former was condemned by the Fourth Amendment and the latter prohibited by the Fifth, the two amendments must necessarily be linked to one another.[121] In the Court's words, "compelling a man in a criminal case to be a witness against himself ... throws light on the question as to what is an 'unreasonable search and seizure.'"[122]

Boyd's facts concerned a search and seizure involving the government's use of subpoenas.[123] Subsequent to *Boyd*, throughout what is commonly known as the "Lochner era,"[124] the Court handed

117. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785 (1994).

118. Harvey Wingo, *Growing Disillusionment With the Exclusionary Rule*, 25 SW. L.J. 573, 583 (1971). Illegally seized evidence is largely considered reliable. This is the case because there are generally two issues that bring the trustworthiness of evidence into question. Namely, (1) whether it was seized in the place alleged, and (2) if it somehow connects the defendant to the illegal act. Neither of the answers to these two questions is affected by a violation of the accused's Fourth Amendment rights. *Id.*

119. 116 U.S. 616, 630 (1886) (holding that the seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself and thus prohibited by the Fifth Amendment).

120. *Id.*

121. *Id.* at 633.

122. *Id.*

123. Amar, *supra* note 117, at 787-88.

124. The "Lochner era" refers to Lochner v. New York, 198 U.S. 45 (1905), where the majority of the Supreme Court justices believed that the freedom that pervaded American culture must continue to survive. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.3 (5th ed. 1995). Thus, in order to fulfill

down a series of holdings sounding in the spirit of *Lochner*.[125] However, conspicuously missing from the facts of *Boyd*'s progeny[126] was the government's exercise of its subpoena power to compel self-incrimination by the defendants.[127] This clearly displayed a willingness by the Court to expand *Boyd* to further exclude evidence obtained in violation of the Constitution.[128]

Although there is a sort of superficial appeal to this *Lochner*-type philosophy of protecting an individual from the prosecution's use of his property against him, when considered in more depth, significant flaws quickly become apparent.[129] First, it is difficult to understand how this theory can correctly be applied to the exclusion of evidence in the form of contraband and stolen goods since the defendant never lawfully owned these items.[130] Second, when considering the Court's holding in *Schmerber v. California*,[131] it is impossible to reconcile how if the seizure of a defendant's blood is not a form of self-incrimination the admission of his blood stained shirt can be.[132] In either case, there is simply no overlap between the Fourth and Fifth Amendments.[133]

The fundamental mistake in *Boyd*'s holding is that the "Fifth

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their perceived obligation of protecting laissez faire economic activity, the freedom to contract in the marketplace, and the property rights of individuals, these justices exercised substantive due process, the commerce clause, the contract clause, and the equal protection clause to strike down as unconstitutional those laws that they felt interfered with these concepts. *Id.*

125. Amar, *supra* note 117, at 788.

126. *See* Gouled v. United States, 255 U.S. 298, 306 (1921) (finding that where the Fourth Amendment is violated by a government official by means of an unlawful search and seizure of the accused's papers, the use of these documents as evidence against him is a violation of the Fifth Amendment's protection against self-incrimination); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (holding that unless gained from an independent source, evidence gained in violation of the commands of the Fourth Amendment shall not be used in any way); Weeks v. United States, 232 U.S. 383, 398 (1914) (reaching the conclusion that since defendant's papers were taken from his house in violation of the Fourth Amendment, they should have been returned to him as per his request without ever being admitted into trial).

127. Amar, *supra* note 117, at 787-88.

128. *Id.*

129. *Id.* at 788.

130. *Id.*

131. 384 U.S. 757, 761-62 (1966) (holding that since the extraction of the accused's blood for analysis purposes did not involve either compelled testimony or evidence of a communicative or testimonial nature, he was not entitled to Fifth Amendment protection).

132. Amar, *supra* note 117, at 788.

133. *Id.*

Amendment applies only to 'testimonial' disclosures."[134] As Chief Justice Burger wrote in his famous dissenting opinion in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, "the Self-Incrimination Clause [of the Fifth Amendment] does not protect a person from the seizure of evidence that is incriminating. It protects a person only from being the conduit by which the police acquire evidence."[135] As Justice Holmes compendiously stated in *Johnson v. United States*,[136] "[a] party is privileged from producing the evidence, but not from its production."[137]

B. *The Fifth Amendment Loses Favor As The Court Turns To The Fourth Amendment As A Basis For The Exclusion Of Evidence*

Although *Boyd* is credited with starting the conflation of cases leading to the modern day exclusionary rule, *Weeks v. United States* was actually the first case where the exclusion of evidence was based on the Fourth Amendment alone.[138] The Court explained that:

> [t]he effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law .... The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions ... should find no sanction in the judgments of the courts ....[139]

134. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting).

135. *Id.*

136. 228 U.S. 457 (1913).

137. *Id.* at 458. *See also* United States v. Wade, 388 U.S. 218, 221 (1967) (explaining that requiring the individuals in a lineup to wear strips of tape such as allegedly worn by the assailant and to utter phrases he allegedly uttered at the crime scene did not violate the defendant's Fifth Amendment privilege against self-incrimination); Holt v. United States, 218 U.S. 245, 252-53 (1910) (holding that compelling the defendant at trial to put on the blouse worn by the assailant did not encroach upon his Fifth Amendment guarantee against self-incrimination). "[T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort *communications* from him ...." *Id.* (emphasis added).

138. Weeks v. United States, 232 U.S. 383 (1914); LAFAVE, *supra* note 97, at § 1.1(c).

139. *Weeks*, 232 U.S. at 391-92.

After the *Weeks* decision came down, federal officials were forced to deal with the specter of evidence being excluded whether they purposefully or inadvertently violated a suspect's Fourth Amendment rights.[140]

Thirty-five years later, in *Wolf v. Colorado*,[141] the Court considered the issue of whether or not the *Weeks* exclusionary rule should apply to the States via Fourth Amendment incorporation into the Due Process Clause[142] of the Fourteenth Amendment.[143] It was in *Wolf* that the Court explained that the exclusionary rule did not have a textual constitutional basis but was instead a creation of the Court.[144] Already in 1949, the Court started to recognize a deterrence basis for the exclusion of certain evidence when it noted that "the exclusion of evidence may be an effective way of deterring unreasonable searches."[145] Although the *Wolf* Court ultimately declined to incorporate the Fourth Amendment into the Fourteenth, perhaps the case's most vital contribution to the evolution of the exclusionary rule was its finding that an individual's right of privacy against arbitrary intrusion by law enforcement is "at the core of the Fourth Amendment" and "basic to a free society."[146] The Court continued that "[i]t is therefore implicit in 'the concept of ordered liberty'[147] and as such is enforceable against the States through the

140. *Id.* at 393 (declaring that if a person's fundamental right against unreasonable search and seizure is violated, the Fourth Amendment is of no value to that individual unless the evidence gained by such means is excluded from trial).

141. 338 U.S. 25 (1949).

142. U.S. CONST. amend. XIV. "No State shall ... deprive any person of life, liberty, or property, without due process of law." *Id.*

143. *Wolf*, 338 U.S. at 25-26.

144. *Id.* at 28 (explaining that *Weeks* "was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication"). *See also* United States v. Williams, 504 U.S. 36, 45-46 (1992) (quoting United States v. Hasting, 461 U.S. 499, 505 (1983) and noting that the federal courts may use their "supervisory power[s]" to "formulate procedural rules not specifically required by the Constitution or the Congress"); Stone v. Powell, 428 U.S. 465, 482 (1976) ("The exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment."); United States v. Calandra, 414 U.S. 338, 348 (1974) (concluding that "the [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights").

145. *Wolf*, 338 U.S. at 31.

146. *Id.* at 27.

147. The *Wolf* majority is referring to Justice Cardozo's opinion in Palko v. Connecticut, 302 U.S. 319, 324-25 (1937), where he stated that those immunities valid as against the federal government that are "implicit in the concept of ordered liberty" become valid as against the States via their selective incorporation

Due Process Clause."[148]

Accordingly, *Wolf* by no means left open the door to state law enforcement officers to unlawfully seize evidence by any means necessary to achieve a conviction.[149] The Court demonstrated its unwillingness to allow such police misconduct in the infamous case of *Rochin v. California*.[150] However, instead of using the marriage of the Fourth and Fifth Amendments as a basis for excluding the evidence, the Court reasoned that the police conduct "shocks the conscience" and, therefore, evidence obtained by such means must be suppressed.[151] Although Justices Black and Douglas concurred in the majority's opinion, they would have suppressed the evidence, based not on the Court's new "shocks the conscience" test, but upon "the Fifth Amendment's command that 'No person . . . shall be compelled in any criminal case to be a witness against himself.'"[152]

Only two years after *Rochin* was decided, it became clear in *Irvine v. California*[153] that the "shocks the conscience" test recently developed by the Court would not be sufficient to protect against all Fourth Amendment violations by the police.[154] In *Irvine*, the police obtained the evidence ultimately used to convict the defendant by means of a microphone surreptitiously installed in his house.[155] Through the use of a key made by one of the officers, they were able to easily and freely enter the abode two additional times to

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into the Fourteenth Amendment.

148. *Wolf*, 338 U.S. at 27-28.

149. LAFAVE, *supra* note 97, at §1.1(d).

150. 342 U.S. 165 (1952). In *Rochin*, California police officers obtained information that the defendant was involved in the illegal sale of narcotics. As the police entered Rochin's home they witnessed him disposing of evidence by way of ingestion. In response, officers took him to a hospital and ordered the doctor to force emetic solution through a tube into the defendant's stomach against his will. This "stomach pumping" procedure induced vomiting which produced two capsules of morphine that were ultimately used as evidence to secure a conviction. *Id.* at 166.

151. *Id.* at 175.

152. *Id.* at 174-75 (Black, J., concurring) (quoting Adamson v. People of State of California, 332 U.S. 46, 68-123 (1947), as a reason for his belief); *Id.* at 179 (Douglas, J., concurring) (stating that based on the dictates of the Fifth Amendment, whether the evidence is in the form of words taken from a man's lips, capsules seized from his stomach, or blood extracted from his veins, it is inadmissible if obtained without his consent).

153. 347 U.S. 128 (1954).

154. LAFAVE, *supra* note 97, at §1.1(d).

155. *Irvine*, 347 U.S. at 129.

move the microphone.[156] Although such conduct seemed to violate the fundamental principles declared by the Fourth Amendment, the "shocks the conscience" test proved inadequate because no matter how obnoxious the police misconduct might have been, it simply did not "involve coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping."[157]

The demonstrated incapacity of the *Rochin* test to deal with the problems of egregious police misconduct is largely considered to be the reason behind the Supreme Court's decision to overrule *Wolf* a mere twelve years after it was decided.[158] In the landmark case of *Mapp v. Ohio*,[159] the Court again had the occasion to consider whether the Fourth Amendment should be applicable to the States via the Fourteenth Amendment.[160] Finding alternative methods of Fourth Amendment protection to be "worthless and futile"[161] the Court reversed the lower court's decision and reasoned that:

> [s]ince the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so epemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty ...."

156. *Id.*

157. *Id.* at 133.

158. JEROLD H. ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION, 41-42 (1984 & Supp. 1991).

159. 367 U.S. 643 (1961).

160. *Id.* at 645-46. In *Mapp*, the police forcibly entered defendant's home without either a search warrant or her permission. In the course of their widespread illegal search they discovered obscene materials which were ultimately used to secure a conviction in court. The Ohio Supreme Court refused to reverse the conviction because although "the 'methods' employed to obtain the evidence were such as to 'offend' a sense of justice, ... [it was not] taken from defendant's person by the use of brutal or offensive physical force." State v. Mapp, 166 N.E.2d 387, 389-90 (1960).

161. Mapp v. Ohio, 367 U.S. 643, 652 (1961).

> [T]he admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.[162]

In dicta, the Court reaffirmed that the purpose of the exclusionary rule is to deter.[163]

C. *Deterrence As A Basis For Excluding Evidence*

Following *Mapp v. Ohio*, the Court has continued to adhere to deterrence as the basis for the exclusionary rule.[164] For example, in *United States v. Calandra*,[165] the Supreme Court stated that "the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."[166] In *Stone v. Powell*,[167] the Court explained that the predominant theory behind the use of the exclusionary rule is that it will decrease the frequency of future violations.[168] The Court reasoned that by removing the incentive to disregard the Fourth Amendment through the exclusion of evidence, law enforcement officials would thereby be discouraged from violating a suspect's constitutional rights.[169] More modern cases such as *Immigration and Naturalization Service v. Lopez-Mendoza*,[170] and *United States v. Leon*,[171] have echoed this principle.

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162. *Id.* at 655-56.

163. *Id.* at 656. *See also* Elkins v. United States, 364 U.S. 206, 217 (1960) (noting that the exclusionary rule's "purpose is to deter–to compel respect for the constitutional guaranty in the only effectively available way–by removing the incentive to disregard it").

164. LAFAVE, *supra* note 97, at §1.1(f).

165. 414 U.S. 338 (1974).

166. *Id.* at 347.

167. 428 U.S. 465 (1976).

168. *Id.* at 492. *See also* United States v. Janis, 428 U.S. 433, 446 (1976) (establishing that the primary purpose of the exclusionary rule is to deter future police misconduct).

169. *Powell*, 428 U.S. at 492.

170. 468 U.S. 1032, 1050 (1984) (finding that since the INS had already taken reasonable and sensible steps to deter Fourth Amendment violations by its officers, any additional deterrent effect brought about by the exclusion of evidence would be minimal).

171. 468 U.S. 897 (1984). In establishing the "good faith" exception to the warrant requirement of the Fourth Amendment, the Court concluded that the

The Supreme Court has discussed other purposes for the exclusionary rule. For example, the Court has identified the need to preserve the imperative of judicial integrity.[172] In *Elkins v. United States*, the majority explained that the courts must not be seen as accomplices in the willful disobedience of the Constitution.[173] Yet another purpose for the exclusionary rule recognized by the Court is the need to assure the public that the courts will not allow the government to profit from its own illegal behavior.[174] The *Calandra* court reasoned that the framers of the Constitution fashioned the exclusionary rule to assure "all potential victims of unlawful government conduct–that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[175]

Although these other purposes for the exclusionary rule obviously have some merit, it is the rule's presumed deterrent effect that has won the day.[176] Writing for the majority in *Stone v. Powell*,[177] Justice Powell reiterated that the primary justification for the exclusionary rule is its deterrent effect on police conduct that violates the peoples' Fourth Amendment rights. In considering why the preservation of judicial integrity was not the primary purpose for the rule, the *Powell* Court reasoned that:

> [l]ogically extended this justification would require that courts exclude unconstitutionally seized evidence despite lack of objection by the defendant, or even over his assent .... Similarly, the interest in promoting judicial integrity does not prevent the use of illegally seized evidence in grand jury proceedings. Nor does it require that the trial court exclude such evidence from use for impeachment of a defendant, even though its introduction is certain to result in conviction in some cases. The teaching of these cases is clear. While courts, of course, must ever be con-

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marginal deterrent effect brought about by the exclusion of evidence obtained by means of an invalid search warrant did not outweigh the substantial societal costs of excluding such evidence. *Id.* at 921-22.

172. LAFAVE, *supra* note 97, at §1.1(f).

173. Elkins v. United States, 364 U.S. 206, 223 (1960) (citing McNabb v. United States, 318 U.S. 332, 345 (1943), Justice Stewart, writing for the majority, said "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law").

174. LAFAVE, *supra* note 97, at §1.1(f).

175. United States v. Calandra, 414 U.S. 338, 357 (1974).

176. LAFAVE, *supra* note 97, at §1.1(f).

177. 428 U.S. 465 (1976).

cerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence.[178]

A certain shortcoming of the "judicial integrity and fairness" theory becomes apparent by posing and answering two simple questions. First, do courts in all of those nations that have not adopted an exclusionary rule (Great Britain) of some sort necessarily lack integrity because, for example, they allow reliable and probative evidence of criminal guilt?[179] Second, since civil courts of the United States do not use the rule, are the verdicts somehow deficient?[180] Both of these inquiries must, of course, be answered in the negative. As stated by Professor Akhil Reed Amar, it is important to remember that "integrity and fairness are also threatened by excluding evidence that will help the justice system to reach a true verdict."[181] Regarding the notion that government must not be allowed to profit from its own wrongdoing, Professor Amar correctly indicates that those criminals who commit the abhorrent crimes that are often subject to application of the exclusionary rule[182] should not gain a windfall over the people who both expect and deserve a prosecution from the production of evidence that is wholly reliable.[183]

IV. THE NEGATIVE IMPLICATIONS OF THE EXCLUSIONARY RULE

With the Court no longer willing to accept *Boyd*'s linkage of the Fourth and Fifth Amendments as a reason for excluding reliable evidence, and its admission that the rule's true purpose is neither to preserve judicial integrity nor to assure individuals that the government will not profit from its wrongful deeds, there is but one rationale remaining–that of deterrence. However, the fact of the matter is that there is a lack of data to support this proposition.[184]

178. *Id.* at 485.
179. Amar, *supra* note 117, at 792.
180. *Id.*
181. *Id.* at 792–93.
182. *Infra* notes 237-39 and accompanying text.
183. Amar, *supra* note 117, at 793.
184. Dallin H. Oaks, *Studying Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 755 (1970) (explaining that there is "hardly any evidence" that the exclusionary rule exerts any deterrent effects on police behavior); William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to Exclusionary Rule*, 69 GEO. L.J. 1361, 1379 (1981). *See also* United States v. Janis, 428 U.S. 433, 449-50 (1976) (noting that although many scholars have attempted to determine whether the rule indeed does have an exclusionary effect, each study appears to be flawed);

In fact, what little evidence there is suggests that the exclusionary rule is actually ineffective as a deterrent.[185] Given that there is a dearth of empirical evidence to support the effectiveness of the exclusionary rule as a deterrent, combined with the fact that "this effect is not so inherently likely that we can assume it to exist in the absence of proof," it is difficult to support its continued wholesale use.[186]

A. *The Exclusionary Rule: An Ineffective Means Of Deterring Fourth Amendment Violations by Law Enforcement*

A major problem with the deterrence theory is that it is not always necessary that there be a relationship between the Fourth Amendment violation and the excluded evidence.[187] Because the main focus of the exclusionary rule is deterrence, the courts do not actually consider the person whose rights were violated.[188] Instead, what they consider when making the determination of whether or not to exclude evidence is if the deterrent effects that might accrue from the exclusion outweigh the societal costs that will be incurred

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Stone v. Powell, 428 U.S. 465, 492 (1976) (observing that there is an absence of empirical data to support the exclusionary rule); *Id.* at 499 (Burger, C.J., concurring) (emphasizing that "[n]otwithstanding Herculean efforts, no empirical study has been able to demonstrate that the rule does in fact have any deterrent effect"); Elkins v. United States, 364 U.S. 206, 218 (1960) (explaining that there are no empirical statistics available to show a reduced frequency in Fourth Amendment violations between those states that have adopted the exclusionary rule and those that admit evidence that has been unlawfully obtained.).

185. Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 10-11 (1964). *See also* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance of the Law*, 24 U. MICH. J.L. REFORM 311 (1991). In 1991, Professors Heffernan and Lovely announced the results of their empirical study where they addressed the issues of law enforcement's knowledge and understanding of the constitutional rules of search and seizure and their willingness to adhere to them. Their analysis consisted of both questionnaires and interviews administered to officers located in four different police departments located in New England and the mid-Atlantic states. They concluded that the rules of search and seizure are so vague and complex that any deterrent effect that the exclusionary rule might have is questionable. In addition, they noted that "it seems unlikely that the fourth amendment rules could be simplified enough to enhance deterrence." *Id.* at 339. The researchers noted that "even when officers are extensively trained and also disposed to adhere to the law, they still will make a substantial number of errors about the legality of intrusions because they do not know what the law requires of them." *Id.* at 326-45.

186. Charles Alan Wright, *Must a Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 741 (1972).

187. Schroeder, *supra* note 184, at 1378.

188. *Id.*

by not admitting the evidence.[189]

It is all too clear that the exclusion of relevant and reliable evidence aids the guilty defendant whose constitutional rights protecting against unreasonable search and seizure have been violated.[190] However, what becomes of the innocent victim whose Fourth Amendment rights have been violated?[191] There is no redress for that individual because there is no evidence to exclude when the wronged party is without guilt.[192] Yet another deficiency with the deterrence rationale can be found in those cases where a defendant whose rights have been violated agrees to a plea with the State.[193] In such cases, there is no challenge to the evidence illegally obtained and so the victim suffers with no consequential deterrent effect on the officers who illegally obtained the evidence.[194] Similarly, if the officers are not committing the misconduct with an eye toward using evidence at trial, it is unlikely that any kind of deterrent effects will be experienced.[195] As Chief Justice Warren laconically stated in his *Terry* opinion:

> Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.[196]

It is often the case that police officers consider their most important function to be that of ferreting out crime, not necessarily to collect evidence to eventually be used at trial.[197] When confronted with suspicious circumstances, officers, for a variety of reasons,[198] do

189. *Id.*

190. *Id.* at 1379-80.

191. *See* Irvine v. California, 347 U.S. 128, 136 (1954) (explaining that the exclusionary rule "protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches").

192. Oaks, *supra* note 184, at 736.

193. Schroeder, *supra* note 184, at 1380; Oaks, *supra* note 184, at 723.

194. Schroeder, *supra* note 184, at 1380.

195. Oaks, *supra* note 184, at 720.

196. Terry v. Ohio, 392 U.S. 1, 14 (1968).

197. JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 220 (1966).

198. Reasons include an officer's concerns that deliberating might allow the suspect to either escape or give him the opportunity to somehow dispose of the incriminating evidence. Furthermore, there exists a sense of apprehension that this failure to act expeditiously will cause embarrassment in front of his superiors

not generally feel comfortable taking the time to deliberate about whether or not the suspect's constitutional rights might be violated by police action.[199] The typical law enforcement official mainly considers it his duty to apprehend criminals and remove contraband from the streets.[200] As a result, it is not always considered crucial that the evidence may not subsequently be admitted at a trial to occur at a much later date.[201] It is often the case that law enforcement may perform a search and seizure or make an arrest, not necessarily to secure a conviction, but for the primary purpose of demonstrating to the public that something *is* being done to combat criminal activity.[202] In such cases, "[t]he exclusionary rule can obviously play no role whatsoever ... since no trial is even contemplated."[203] The exclusionary rule often fails to deter because it does not consider the fact that police officers approach their jobs with departmental expectations in mind.[204] Because of the fact that officers are constantly cognizant of the various rewards and sanctions available to the department in response to their performance, generally speaking, their primary concern is not the possible exclusion of illegally seized evidence.[205] Given these alternative motivations, it is unrealistic to think that the suppression of evidence by way of the exclusionary rule will have a significant deterrent effect on law enforcement.[206]

A further reason for the dubious effectiveness of the exclusionary rule as a deterrent is the simple fact that the specter of future exclusion will not deter officers confronted with the heat-of-the-moment decision of whether to seize the evidence or make the

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and colleagues. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. Researchers have cited numerous goals and motivations including arrests for punitive reasons, arrests for the purpose of controlling and relocating vice operations, searches in an effort to establish and maintain the services of informants, searches for the purpose of removing drugs or weapons from the street, searches aimed at recovering stolen property, and the closing down of vice operations as an aid in nuisance abatement procedures. Oaks, *supra* note 184, at 721-22; LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 192-99 (Little, Brown & Co. 1967).

203. Wingo, *supra* note 118, at 577.

204. John Kaplan, *The Limits of Exclusionary Rule*, 26 STAN. L. REV. 1027, 1050 (1974).

205. *Id.*

206. *See generally* Burger, *supra* note 185, at 11.

search.[207] The fact of the matter is that the future exclusion of evidence-sometimes years into the future - is not first and foremost on the officer's mind when making his decision because "a policeman is rarely disciplined for action declared illegal by a court as a basis for suppression."[208] As former Chief Justice Burger once wrote, "the notion that suppression of evidence in a given case effectively deters the future action of ... policemen ... was never more than wishful thinking on the part of the courts."[209] In his dissenting opinion in *Bivens*, Chief Justice Burger wrote that "the history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective [of deterrence]."[210] The Chief Justice opined that a critical reason for this failure is the fact that the offending officers themselves are rarely held responsible for their illegal actions.[211] Instead, it is the prosecutors who must eventually grapple with the Fourth Amendment violation by virtue of the exclusion of precious evidence required to secure a conviction.[212] The problem with this is that prosecutors simply do not have the power or control over the police to either induce corrective actions or change police procedures.[213] Because virtually no sanctions are brought upon the officers to effectuate a change in their behavior, the desired effect of the rule never truly comes to fruition.[214]

Yet another factor militating against the effectiveness of the exclusionary rule is the relatively poor communication between the courts and law enforcement.[215] Without effective communication between these two parties, it is nearly impossible for the rule to achieve its desired deterrent effect.[216] As was evident in *Britton*, what further exacerbates the problem is the unfortunate tendency of the courts to come down with inconsistent decisions concerning

207. *Id.*
208. *Id.*
209. *Id.* at 12.
210. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting).
211. *Id.* at 416.
212. *Id.*
213. *Id.* at 417.
214. *Id.* at 416.
215. *Id.* at 417 (pointing out that "opinions sometimes lack helpful clarity"); Wingo, *supra* note 118, at 578 (noting that trial court judges quite frequently fail to satisfactorily explain their rulings to law enforcement officers). *See also* Oaks, *supra* note 184, at 730-31.
216. Oaks, *supra* note 184, at 730.

the issue of "reasonableness."[217] The holdings are often so ambiguous that even judges themselves would be confused with the state of the law regarding arrest and search and seizure.[218] If the sharply divided courts cannot agree on what is and is not "reasonable," it is difficult to understand how officers faced with the pressures of making heat-of-the-moment decisions can be expected to clearly comprehend exactly what is demanded of them.[219] As a final word on the subject of communication, it is worth noting that in those rare cases where the officer responsible for the illegal search and seizure is actually notified of the final judicial decision to suppress the evidence, due to the often lengthy time lapse since the Fourth Amendment violation, any educational effect that the exclusionary rule might have had is severely minimized.[220]

B. *The Exclusionary Rule's Detrimental Effect On Both Society And The Police*

Often, application of the exclusionary rule results in an immediate end to the prosecution.[221] This in turn likely results in the release of a guilty defendant.[222] Precisely for this reason, the rule "deprives society of its remedy against one lawbreaker because he has been pursued by another."[223] This result has a detrimental effect on society because it incorrectly forces the courts to refocus their attention on the police misconduct as opposed to the original purpose of the trial–the determination of the defendant's guilt or innocence.[224] This deleterious effect is only magnified when the police violation was merely technical in nature as opposed to an all

217. Wingo, *supra* note 118, at 577-78.

218. Burger, *supra* note 185, at 9-10.

219. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 417 (1971).

220. *Id.*

221. Schroeder, *supra* note 184, at 1382.

222. Irvine v. California, 347 U.S. 128, 136 (1954). *See also* Schroeder, *supra* note 184, at 1384 (observing that excluded evidence is "generally reliable and probative"); Wingo, *supra* note 118, at 583 (noting that in the majority of cases, evidence suppressed by means of the exclusionary rule is actual proof of guilt).

223. *Irvine*, 347 U.S. at 136. *See also* JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2184a, at 31 n.1 (1961) (stating "[o]ur way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else").

224. Oaks, *supra* note 184, at 755; *See* Monard G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L. & CRIMINOLOGY AND P.S. 255, 256-57 (1961).

out invasion of the defendant's substantive rights.[225] Such results effectively demonstrate to law-abiding individuals that the judicial system allows the guilty to simply go free.[226] In other words, "[t]he operation of the Suppression Doctrine unhappily brings to the public gaze a spectacle repugnant to all decent people–the frustration of justice."[227] Such a demonstration has the ruinous effect of eroding the peoples' respect for both the laws themselves and the courts that interpret them.[228]

Even if exclusion of the evidence does not ultimately result in freedom for the wrongdoing defendant, a court's refocus from the lawbreaker to the law-enforcer, nevertheless, creates unnecessary delays in the administration of justice.[229] The purpose of a criminal defendant's trial is not to rule on alleged police misconduct, but to determine the guilt or innocence of the accused.[230] Furthermore, because excluded evidence more often than not is probative of guilt,[231] society is often imperiled by dangerous individuals[232] who are released for long periods pending trial while the court considers procedural issues relating to administration of the rule.[233]

Because the exclusionary rule, rather than having a deterrent effect on the police, directly affects the prosecutor who represent the people, it can be fairly asserted that, instead of one of the offending parties, it is actually the people who are punished by the

225. Schroeder, *supra* note 184, at 1384. In such cases, "the windfall that the exclusionary rule affords a defendant accused of a serious crime seems totally out of proportion to the magnitude of the police error." *Id.*

226. Paulsen, *supra* note 224, at 256. *See also* John R. Brown, *Good Faith Exception to the Exclusionary Rule*, 23 S. TEX. L.J. 655, 661 (1982) (observing that lay people who are unfamiliar with the criminal justice system are often "dismayed and sometimes disgusted at the spectacle of a criminal being released" by means of what they view as an acquittal based on a mere technicality); Wingo, *supra* note 118, at 584.

227. Burger, *supra* note 185, at 12.

228. Frederick A. Bernardi, *The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?*, 30 DEPAUL L. REV. 51, 107 (1980).

229. Wingo, *supra* note 118, at 583; Oaks, *supra* note 184, at 742; Paulsen, *supra* note 224, at 256-57.

230. *See* Wingo, *supra* note 118, at 583-84 (emphasizing that "[t]o allow the criminal proceedings to be transformed into a court of inquiry concerning the alleged police illegality is nothing less than evasion by the courts of their responsibility in the case").

231. *Supra* note 222.

232. *Infra* notes 237-39 and accompanying text.

233. Schroeder, *supra* note 184, at 1383.

suppression of trustworthy evidence.[234] The mere fact that the people believe this to be the case is sufficient in itself to undermine integrity in the judicial system.[235] This exerts a high political price in that the typical lay person sees the clear frustration of justice without understanding exactly what the rule is supposed to accomplish.[236]

To compound the problem, the multitude of criminals who go free because of the exclusionary rule are those who have committed such hateful crimes as murder, rape, and drug trafficking.[237] The reason that these types of assailants are especially rewarded by the liberal exercise of the rule is that a successful prosecution of these crimes generally requires the use of physical evidence which can only be gathered by means of a search and seizure conducted by law enforcement officials.[238] Unfortunately, given the large volume of such cases and resultant pressures on the police, they are often less careful than far-removed judges would like them to be.[239]

Not only does operation of the exclusionary rule negatively affect society, it also has a pernicious effect on the attitudes of law enforcement. These can be manifested in at least three ways. First, the suppression of evidence gathered by an officer in good faith can create a lack of motivation toward performing his duty in the future.[240] Second, as the Fifth Circuit pointed out in *United States v. Williams*,[241] where a police officer conducts a search and seizure in such a way that he truly believes that he is not transgressing the bounds of law, application of the rule does not further the interests of justice.[242] Instead, it may actually work as a hindrance by forcing the officer to be so overcautious that he fails to act under circumstances where his proper training and reasonable instinct tell him that the activity he is observing is indeed criminal.[243] Finally, the suppression doctrine "operate[s] as a demoralizing element in law enforcement agencies."[244] The police view the courts' exclusion of trustworthy evidence as an abrupt change in judicial focus from the

234. Wingo, *supra* note 118, at 576.
235. Schroeder, *supra* note 184, at 1384.
236. Kaplan, *supra* note 204, at 1027; Burger, *supra* note 185, at 12.
237. Wright, *supra* note 186, at 741; *see also* Amar, *supra* note 117, at 793.
238. Wright, *supra* note 186, at 741.
239. *Id.*
240. Schroeder, *supra* note 184, at 1413.
241. 622 F.2d 830 (5th Cir. 1980).
242. *Id.* at 842.
243. *Id.*
244. Burger, *supra* note 185, at 12.

criminal to the enforcer.[245] Such an impression by the typical officer has the damaging effect of instilling a sense of complete disdain in the judicial system.[246]

V. AN ALTERNATIVE SOLUTION TO THE RULE

The strict application of the exclusionary rule has resulted in an "inflexible sanction."[247] This is so because it applies equally regardless of whether the offending officer's unlawful act was the result of an egregious Fourth Amendment violation or merely due to a good faith error in judgment.[248] Furthermore, since the courts do not perform any kind of balancing analysis when applying the rule, the extent of the crime's brutality and maliciousness is simply immaterial.[249] However, in *Terry* the Supreme Court made it abundantly clear that "there is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.'"[250] As a result, it is somewhat perplexing that, when determining whether or not to suppress a certain piece of evidence, the Court has refused to perform a balancing test which considers the context of the constitutional intrusion.[251]

It makes little sense to continue to interfere with the pursuit of justice by blindly adhering to a rule that, at a terrible cost to society, has miserably failed to achieve its purported purpose.[252] Although

245. *Id.*
246. Wingo, *supra* note 118, at 576.
247. *Id.* at 584–85.
248. *Id.* at 585.
249. *Id.*
250. Terry v. Ohio, 392 U.S. 1, 20-21 (1968) (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967), which was decided one year earlier than *Terry*).
251. Schroeder, *supra* note 184, at 1384 (arguing that "assessing the constitutionality of intrusions without regard for the context . . . strains the process of fourth amendment interpretation").
252. United States v. Williams, 622 F.2d 830, 847 (5th Cir. 1980). In reversing the lower court's decision to suppress the evidence, the Fifth Circuit stated:

> Where the reason for a rule ceases, the rule should also cease a familiar maxim carrying special force here. For here the cost of applying the rule is one paid in coin minted from the very core of our factfinding process, the cost of holding trials at which the truth is deliberately and knowingly suppressed and witnesses, in contravention of their oaths, are forbidden to tell the whole truth and censured if they do. This is a high price indeed and one that ought never be paid where, in reason, no deterrence is called for and none can in fact be had. Such a continued wooden application of the rule beyond its proper ambit to situations that its pur-

researchers have been unable to agree on whether the rule is an effective deterrent, there is clear recognition of the negative effects brought about by the continuous and systematic exclusion of reliable and trustworthy evidence.[253] Dissenting in *Stone v. Powell*,[254] Justice White accurately observed that it is entirely illogical[255] to exclude probative evidence because the defendant's constitutional rights were violated.[256] The suppression of evidence that may very well have been the instrumentality of the crime does absolutely nothing to recompense the individual whose Fourth Amendment rights were violated.[257] By allowing the guilty to go free, this judicially-imposed sanction effectively deprives the people of their right to be truly secure in their persons, houses, papers, and effects.[258]

There is no doubt that constitutional violations by law enforcement are a matter of grave concern and need to be addressed. However, over a century of dismal failures has demonstrated the imperative need to seriously consider a completely new remedy, rather than continuing to try and use the exclusionary rule as a "blunderbuss."[259]

As far back as *Wolf*, decided in 1949, the Court encouraged state legislatures to consider alternatives to the exclusionary rule.[260]

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poses cannot serve bids fair to destroy the rule entirely in the long run. *Id.*

253. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting); Burger, *supra* note 185, at 15; Heffernan & Lovely, *supra* note 185, at 15–18.

254. 428 U.S. 465, 541-42 (1976) (White, J., dissenting).

255. The great evidence scholar, John Henry Wigmore, has described the exclusionary rule as being both "indirect and unnatural." WIGMORE, *supra* note 223, at 31 n.1. He described the awkward operation of the rule as follows:

> Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution.

Id. (emphasis in original).

256. *Stone*, 428 U.S. at 541-42.

257. *Id.* at 542.

258. Although the Fourth Amendment was, of course, written and ratified to protect the people against *governmental* interference, it could be fairly argued that the courts' strict adherence to the monolith known as the exclusionary rule has effectively deprived society of its security and freedom by putting patently guilty offenders back on the street due to purely technical reasons.

259. LAFAVE, *supra* note 97, at §1.1(e).

260. Wolf v. Colorado, 338 U.S. 25, 33 (1949), *aff'g* 187 P.2d 926 (Colo. 1947),

It has been almost forty years since *Mapp* made the rule applicable to the states via its incorporation into the Fourteenth Amendment's Due Process Clause.[261] Despite all of its inherent deficiencies, Minnesota has failed to adopt a clear alternative. What makes this even more frustrating is the fact that there is absolutely no constitutional basis for the suppression of reliable and trustworthy evidence.[262] If the Framers had intended for the courts to exercise such incredible authority, they would have made an explicit declaration in the text of the Constitution.[263] In fact, when one considers its history, it becomes apparent that the Fourth Amendment assumes a remedy sounding in tort rather than in criminal law.[264] Therefore, rather than suppressing probative evidence, we should look to a linkage between the Fourth and Seventh Amendments[265] when attempting to devise a remedy for an illegal search and seizure.[266]

A. *The History Of The Fourth Amendment And Civil Jury Trials*

The early English cases that gave impetus to the Fourth Amendment demonstrate how civil damage actions and jury trials were routinely used to create a system of accountability for those law enforcement personnel who unreasonably intruded into an individual's person, property, or privacy.[267] In *Wilkes v. Wood*,[268] the plaintiff, John Wilkes, brought a trespass action in the Court of Common Pleas against Robert Wood.[269] Wood, with several of the King's messengers, entered Wilkes' house and proceeded to search and seize the contents of several locked containers without taking an inventory.[270] The court framed the issue as whether a Secretary

overruled by Mapp v. Ohio, 367 U.S. 643 (1961).

261. *Mapp*, 367 U.S. at 656-58.

262. *E.g.*, Wingo, *supra* note 118, at 585-86 (arguing that since the exclusionary rule rests upon a "shaky foundation," abandoning the rule should by no means be an insurmountable task).

263. *See id.* at 585 (observing that "the Supreme Court has overstepped its authority by writing into the fourth amendment a constitutional requirement that is simply not there").

264. Amar, *supra* note 117, at 758.

265. The Seventh Amendment to the United States Constitution provides that "[i]n suits at common law ... the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law." U.S. CONST. amend. VII.

266. Amar, *supra* note 117, at 759.

267. *Id.*

268. 98 Eng. Rep. 489 (C.P. 1763).

269. *Id.*

270. *Id.* at 489, 491.

of State possesses the legal authority to forcefully enter an individual's house, break into its contents, and seize the documents from within upon a bare suspicion of libel by a general warrant without naming the person charged.[271] The jury answered this question in the negative and awarded Wilkes damages in the amount of 1,000 pounds.[272] The court explained that a jury has the power to give punitive damages as a means of deterring such illegal conduct in the future and as proof of their detestation for the lawless invasion of the plaintiff's rights.[273] In his final instruction to the jury, the Lord Chief Justice instructed them that "if [they] found Mr. Wilkes the author or publisher of [the libelous material], it will be filed, and stand upon record in the Court of Common Pleas, *and of course be produced as proof, upon the criminal cause.*"[274]

Wilkes was, of course, not the only major decision of the time which served as proof that the English courts never envisioned the wholesale exclusion of evidence gathered by illegal means, but instead a civil remedy meant to deter such unlawful conduct. In the same year *Wilkes* was decided, the Court of Common Pleas heard *Huckle v. Money*,[275] which again involved an action in trespass over a search and seizure of the plaintiff's house by means of a general warrant.[276] In the final part of the court's holding, the Lord Chief Justice concluded that the jury was within its right to award exemplary damages and noted that "it is very dangerous for the Judges to intermeddle *in damages for torts.*"[277] A year later, in 1764, the Court of Common Pleas decided *Beardmore v. Carrington*.[278] Here, the issue was whether the jury's award of 10,001 pounds to the plaintiff as damages for trespass and false imprisonment occasioned upon an illegal general warrant was excessive thereby requiring a new trial.[279] In a per curiam decision, the court held that the damages were not excessive because such an exercise of tortious behavior by state officials tramples upon the liberty of every one of the King's subjects and cannot be condoned.[280]

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271. *Id.* at 490.
272. *Id.* at 499.
273. *Id.* at 498-99.
274. *Id.* at 499 (emphasis added).
275. 95 Eng. Rep. 768 (C.P. 1763).
276. *Id.* at 768.
277. *Id.* at 769 (emphasis added).
278. 95 Eng. Rep. 790 (C.P. 1764).
279. *Id.* at 791.
280. *Id.* at 794. *See also* Entick v. Carrington, 95 Eng. Rep. 807, 811 (C.P. 1765) (instructing the jurors that if they were to find that the accused government offi-

Colonists in the New World also enthusiastically embraced the role of the jury in awarding monetary damages for illegal searches and seizures by government officials.[281] For example, in a PENNSYLVANIA HERALD article dated October 17, 1787, an anonymous Democratic Federalist[282] colorfully articulated the necessity for a trial by jury with the following pointed discussion:

> Suppose ... that a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman, and searched under her shift,– suppose, I say, that they commit similar, or greater indignities, in such cases a trial by jury would be our safest resource, *heavy damages would at once punish the offender, and deter others from committing the same* ....[283]

Similar sentiments were echoed by A Maryland Farmer[284] in his essay appearing in the February 15, 1788, issue of the MARYLAND GAZETTE, where he passionately exclaimed that "no remedy has been yet found equal to the task of detering [sic] and curbing the insolence of office, but a jury ...."[285] That same year, an essay appeared in the January 26, 1788, issue of the MASSACHUSETTS CENTINEL where Hampden emphatically warned that without a trial by jury in civil actions, "no relief can be had against the High Officers of State, for abuse of private citizens."[286] In addition, the prolix yet profound Luther Martin vehemently argued for civil jury trials as a remedy for search and seizure cases.[287] In his GENUINE INFORMATION, delivered to the legislature of the State of Maryland relative to the proceedings of the Philadelphia General Convention of 1788, Martin emphasized the importance of juries to protect

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cials were guilty of the said trespass, then they should award the plaintiff *civil damages*).

281. Amar, *supra* note 117, at 776.

282. Although it is not entirely certain, it is probable that the author was Richard Henry Lee. *See* ESSAY OF A DEMOCRATIC FEDERALIST (1787), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 58, 58 (Herbert J. Storing ed., 1981).

283. *Id.* at 61 (emphasis added).

284. While there is no definitive proof of his identity, it is widely believed that A Maryland Farmer was actually the active Maryland Anti-Federalist, John Frances Mercer. ESSAYS BY A FARMER (1788), *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 5, 5 (Herbert J. Storing ed., 1981).

285. *Id.* at 5, 14.

286. ESSAYS BY HAMPDEN (1788), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 198, 200 (Herbert J. Storing ed., 1981).

287. LUTHER MARTIN, THE GENUINE INFORMATION DELIVERED TO THE LEGISLATURE OF THE STATE OF MARYLAND, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 27, 70-71 (Herbert J. Storing ed., 1981).

against "every arbitrary act of the general government, and every oppression of all those variety of officers appointed under its authority."[288]

This respect for the civil jury system as a means to both redress and deter what we now term "Fourth Amendment violations" carried into American appellate court decisions well into the nineteenth century. In *United States v. La Jeune Eugenie*,[289] the Massachusetts Circuit Court had occasion to consider the legality of a search and seizure of a sailing vessel alleged to be involved in the slave trade.[290] In making that determination, the court noted that if the capture of the ship was ultimately determined to be unlawful, then the State would be liable for both damages and costs.[291] Justice Story expounded that if the seized property turns out not to be possessed by unlawful means, then "the seizor is a trespasser ab initio, and liable, as such, to damages."[292] In addition, the court declined to accept the suppression doctrine in cases of illegally seized evidence. Justice Story stated in laconic fashion:

> In the ordinary administration of municipal law the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it is obtained. If it is competent or pertinent evidence, and not in its own nature objectionable, as having been created by constraint, or oppression, ... the evidence is admissible, ... even though it may have been obtained by a trespass upon the person, or by any other forcible or illegal means. The law deliberates not on the mode, by which it has come to possession of the party, but on its value in establishing itself as satisfactory proof.[293]

In 1841, nineteen years after *La Jeune Eugenie* had been decided, the Supreme Court of Massachusetts decided *Commonwealth v. Dana*[294] where it reaffirmed that it would reject the exclusion of reliable and probative evidence gathered in violation of an individual's Fourth Amendment rights.[295] The court explained that such a

288. *Id.*
289. 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551).
290. *Id.* at 840.
291. *Id.* at 843.
292. *Id.*
293. *Id.* at 843-44.
294. 43 Mass. (1 Met.) 329 (1841).
295. *Id.* at 337.

violation is remedied, not by suppressing pertinent evidence, but by making the responsible party liable for his actions.[296] Writing for the court, Justice Wilde made clear that "[w]hen papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully."[297]

B. The Tort Remedy Alternative

History clearly demonstrates that the Fourth Amendment was drafted so as to provide for the award of monetary damages in those situations where overzealous government officials violated its commands.[298] Furthermore, its guarantee that the people shall be "secure in their persons, houses, papers, and effects"[299] is reminiscent of those common law tort principles established to protect the peoples' personhood, property, and privacy.[300] Therefore, it would be entirely appropriate for Minnesota to institute a tort remedy that would serve as a complete alternative to the irrational and ineffective exclusionary rule. In other words, if the evidence is reliable and trustworthy, it shall be admitted. Such a remedy would provide the level of deterrence that the courts had always hoped for from the failed suppression doctrine regardless of whether or not the injured party was prosecuted.[301]

A tort remedy would afford the possibility for redress against either the offending law enforcement officer or the police department itself.[302] However, for a number of reasons, the latter would seem to be the superior alternative to adopt.[303] First, if the aggrieved party were to prevail in his civil damage action against the officer, given the nominal asset base of the average law enforcement official, the collectable amount would more than likely be minimal.[304] Second, given the wide zones of individual officer immunity that the courts have created through the years, holding a

296. *Id.*
297. *Id.*
298. Amar, *supra* note 117, at 777.
299. U.S. CONST. amend. IV.
300. Amar, *supra* note 117, at 781.
301. Oaks, *supra* note 184, at 757.
302. *See, e.g.*, Wingo, *supra* note 118, at 579-82 (offering several alternatives to the exclusionary rule including, but not limited to, the right to bring a civil damage action against the wrongdoing police officer, or the ability to file a strict entity liability claim against the government itself).
303. Amar, *supra* note 117, at 812.
304. Wingo, *supra* note 118, at 579-80.

police officer strictly liable for violating an individual's constitutional rights would be an insuperable task indeed.[305] Finally, instituting a strict entity liability scheme for Fourth Amendment violations would instill an increased sense of awareness in the minds of both the taxpayers compelled to take on the escalating financial burden and the legislators forced into the predicament of having to explain the state of affairs.[306]

Proponents of the suppression doctrine often cite to the necessity of preventing invidious discrimination by law enforcement as a reason for invoking the exclusionary rule.[307] However, as Justice Scalia stated in his opinion for a unanimous court in *Whren v. United States*,[308] "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause,[309] not the Fourth Amendment."[310] Therefore, it would be entirely appropriate for Congress to put the failed exclusionary rule to rest and in its place adopt an administrative or quasi-judicial remedy to provide restitution for those victims whose Fourth Amendment rights were violated by the police.[311] By making the government liable for damages caused by its law enforcement personnel via the doctrine of respondeat superior, the aggrieved party would be justly compensated for the invasion of his constitutional rights without the resulting harm that would otherwise inure to society by allowing a truly guilty perpetrator to go free by excluding reliable and trustworthy evidence.[312] In addition, unlike the exclusionary rule which is thoroughly ineffective at redressing the *innocent* victim, a civil damage remedy would fairly provide restitution to all, irrespective of guilt.[313]

Although of vital importance, compensation should not be the government's only goal.[314] Police deterrence should also be the

305. Amar, *supra* note 117, at 812.
306. *Id.* at 813; Wingo, *supra* note 118, at 581-82.
307. *See* Whren v. United States, 517 U.S. 806, 813 (1996).
308. *Id.*
309. "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.
310. *Whren*, 517 U.S. at 813.
311. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting).
312. Wingo, *supra* note 118, at 581.
313. *Bivens*, 403 U.S. at 422 (Burger, C.J., dissenting); Wingo, *supra* note 118, at 582. *See also* Amar, *supra* note 117, at 797 (explaining that with the exclusionary rule, the guiltier a defendant is, the more he benefits).
314. Wingo, *supra* note 118, at 582.

necessary focus of any new scheme that the legislature adopts to replace the exclusionary rule.[315] A civil damage action will have this desired deterrent effect if a record of the wrongful officer's conduct is inserted into his or her personnel file.[316] By taking such action, the department will then have the opportunity to institute disciplinary action and provide for the further training necessary to prevent future Fourth Amendment violations.[317]

In his dissenting opinion in *Bivens*, Chief Justice Burger laid out a simple but effective statutory scheme that could effectively serve as a substitute to the suppression doctrine.[318] His was essentially a five-pronged model that provided for: 1) a waiver of sovereign immunity as to the illegal acts of law enforcement personnel; 2) the creation of a cause of action for those individuals whose constitutional rights were violated by government agents; 3) the creation of a quasi-judicial tribunal responsible for adjudicating claims raised under the statute; 4) a provision directing that a civil damage remedy is completely in lieu of the exclusion of evidence obtained in violation of the Fourth Amendment; and 5) a provision commanding the courts not to exclude any evidence that would otherwise be admissible but for a Fourth Amendment violation.[319] This statutory scheme which provides for government entity liability could be fashioned so as to resemble a U.S.C. 42 Section 1983 cause of action.[320] Because the legislation's success depends entirely upon the Supreme Court's willingness to uphold its constitutionality, it is imperative that the Court embrace the statute as a move toward fairness to not only *all* victims of Fourth Amendment violations, but also society as a whole. Once the Court establishes the constitutional validity, then Minnesota and other states can move toward the development of its own remedial system modeled

315. *Id.*
316. *Bivens*, 403 U.S. at 423 (Burger, C.J., dissenting).
317. *Id.* at 422.
318. *Id.* at 422-23.
319. *Id.*
320. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation on any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C.A. § 1983 (1994).

after that of the federal government.[321]

In *Brown v. Bryan County*,[322] decided in the second half of last year, the Fifth Circuit held that where a police officer uses excessive force in an arrest and causes injury, a municipality can be sued for its "failure to provide proper training" under section 1983.[323] Given a victim has the right to sue a municipality for such a violation of his civil rights, it logically follows that an individual faced with an unlawful search and seizure by law enforcement officials, whether they be federal, state, or local, should be afforded the same opportunity to file for civil damages. Therefore, not only does it make perfect sense for the legislature to pass a statute that strictly demands a civil remedy for Fourth Amendment violations by law enforcement officials, it also would be entirely prudent for the Court to find such a law constitutional and in the best interest of the public.

A familiar criticism of a civil damage remedy is that unless a plaintiff is able to show "real ill will or malice" on the part of the defendant, he will never collect.[324] However, animus behavior on the part of the police officer need not be an element of the statutory scheme. All that would be necessary in order to collect is that there be a violation of a person's Fourth Amendment guarantee against an illegal search and seizure.[325] In addition, in order to avoid a watering down of the statute's effectiveness, the tribunal should consider neither the reasonableness of the law enforcement official's conduct, nor the defendant's bad reputation.[326] After the tribunal has found a Fourth Amendment violation, it would use a sliding scale devised by members of the judiciary and legislative branches that bases damage awards on the severity of the violation. Such a flat fee award structure could be roughly modeled after Minnesota's sentencing guidelines scheme. Finally, judges would be instructed to consider the offending officer's bad faith conduct and number of previous violations as aggravating factors requiring an upward adjustment in the damage award. Adopting such guidelines would help remove much of the subjectivity that might ordi-

321. *Bivens*, 403 U.S. at 423-24 (Burger, C.J., dissenting).
322. 219 F.3d 450 (5th Cir. 2000).
323. *Id.* at 457.
324. Wolf v. Colorado, 338 U.S. 25, 43 (1949) (Murphy, J., dissenting).
325. Amar, *supra* note 117, at 813 (arguing that "[i]f the search and seizure is ultimately deemed unreasonable, the government entity should pay").
326. *Wolf*, 338 U.S. at 43 (Murphy, J., dissenting) (complaining that the use of such factors defeat the injured party's ability to recover).

narily be present when a truly guilty victim alleges a Fourth Amendment violation, thus allowing him to collect more than just nominal damages.[327]

In addition to compensatory damages, punitive damages would also be available just as they were in 1763 when the Court of Common Pleas decided *Wilkes*. As Lord Chief Justice Pratt so eloquently stated over 230 years ago:

> a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as punishment to the guilty, to deter from any such proceeding for the future, and as proof of the detestation of the jury to the action itself.[328]

It need not be necessary for the plaintiff to prove actual harm in order for the court to award exemplary damages against the government.[329] Because "deterrence requires that the defendant must pay more than the plaintiff suffered,"[330] all that would be necessary is a jury finding of a constitutional violation.

VI. CONCLUSION

Officer Taylor and his partner did not violate Britton's Fourth Amendment rights when they stopped him to investigate the broken window.[331] They were well within the scope of their duties and, in fact, would have been derelict if they would have failed to take the actions necessary to either confirm or refute their reasonable suspicions.[332] As the Minnesota Supreme Court succinctly stated the same year *Terry* was decided, "persons found under suspicious circumstances are not clothed with a right of privacy which prevents law-enforcement officers from inquiring as to their identity and actions. The essential needs of public safety permit police officers to use their faculties of observation and to act thereon within proper limits."[333]

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327. Wingo, *supra* note 118, at 579 (noting that critics of a civil action remedy argue that only nominal damages are awarded when a Fourth Amendment violation is actually proved).

328. Wilkes v. Wood, 98 Eng. Rep. 489, 498-99 (C.P. 1763).

329. *Wolf*, 338 U.S. at 43 (Murphy, J., dissenting).

330. Amar, *supra* note 117, at 815-16.

331. State v. Britton, 604 N.W.2d 84, 86 (Minn. 2000).

332. State v. Fish, 280 Minn. 163, 169, 159 N.W.2d 786, 791 (1968).

333. *Id.* at 167, 159 N.W.2d at 789 (citing State v. Clifford, 273 Minn. 249, 141 N.W.2d 124 (1966); State v. Sorenson, 270 Minn. 186, 134 N.W.2d 115 (1965);

Terry is based on a common sense approach that allows law enforcement officials to consider the entire situation and inquire as to whether or not a given act is criminal.[334] As Professor Daniel Richman observed in his analysis of the *Terry* holding, "[t]here *is* such a thing as a real 'hunch,' and ... retrospective judicial inquiries into an officer's conduct may not be able to capture the full extent of this justification."[335] The evidence concerning the intoxicated nature of Britton that was obtained as a result of the stop should have been admitted. Law enforcement officials must be allowed the opportunity to utilize their training and experience to protect the health, safety, and welfare of the communities they serve.[336] To achieve this goal, it is necessary that the courts afford considerable deference to the professional decisions that these police officers are forced to make often with little time for deliberation.[337]

As long as the courts continue to adhere to the exclusionary rule and refuse to admit evidence vital to a successful prosecution, it will be difficult for the people to truly feel secure in their persons, houses, papers, and effects. In an effort to protect this security, the government's interest in the use of veracious and reliable evidence must surely outweigh the minimal intrusion brought about by a brief official police stop. This is not to trivialize the invidious nature of constitutional violations by those individuals we entrust to protect us. However, for such abominations we must look to civil damages, not the exclusion of reliable and trustworthy evidence. A remedial scheme based on strictly monetary awards would have a twofold effect. First, it would allow *all* victims of Fourth Amendment violations to be compensated, even those who are *innocent.* Second, unlike under the exclusionary rule, society would no longer be compelled to suffer as a result of the judicial system allowing a "criminal ... to go free because the constable has blundered."[338]

State *ex rel.* Branchaud v. Hedman, 269 Minn. 375, 130 N.W.2d 628 (1964)).

334. Saltzburg, *supra* note 90, at 952.

335. Richman, *supra* note 50, at 1050 (emphasis added).

336. *Id.* at 1047.

337. *Id.*

338. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

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